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# Supreme Court of the United States

**OCTOBER TERM, 1960**

**No. 511**

HERMAN HOWZE,

*Petitioner,*

*against*

ARROW TRANSPORTATION COMPANY and ZURICH INSURANCE COMPANY,

*Appellees.*

## BRIEF OF APPELLEE ZURICH INSURANCE COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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### STATEMENT OF THE CASE

Herman Howze, petitioner, brought a civil action in the United States District Court for the Southern District of Alabama against Arrow Transportation Company for injuries sustained in the hold of a vessel known as "Grain Barge ATC 107", which was owned and operated by said Arrow Transportation Company, appellee herein. Howze was at the time of the alleged injury employed as a stevedore by the Alabama State Docks Department.

Liability of Arrow to Howze was predicated upon allegations of unseaworthiness of the vessel "Grain Barge ATC 107", and negligence of Arrow in failing to provide Howze with a reasonably safe place to work and reasonably safe gear to work with and about.

The answer filed by appellee Arrow to the civil action filed by Howze contained denials of unseaworthiness and negligence on its part. Arrow also filed a third party complaint against Zurich Insurance Company, the insurer of the Alabama State Docks Department, the employer of Howze, under a policy provision providing for a direct action against Zurich inasmuch as the Alabama State Docks Department as a department of the State of Alabama was immune from suit. The third party complaint filed by Arrow against Zurich alleged, in effect, that in the event Arrow was held to have incurred any liabilty to Howze, Arrow was entitled to indemnity from Zurich by virtue of the Alabama State Docks Department's breach of its implied warranty to unload or discharge the cargo of "Grain Barge ATC 107" in a safe manner and/or because plaintiff's alleged injuries were caused by the primary acting and moving negligence of Alabama State Docks Department, and Arrow demanded judgment over and against Zurich for such sum, if any, as Howze may be awarded against Arrow.

Zurich filed an answer to the third party complaint and also included therein a claim against Howze for reimbursement by Howze for workmen's compensation benefits paid to Howze or for the benefit of Howze by Zurich in the event of any recovery from Arrow by Howze.

The third party action by Arrow against Zurich, and the claim against Howze by Zurich were both predicated and conditioned upon there first being a recovery by Howze against Arrow.

On August 5, 1959, Arrow's motion for summary judgment against Howze was granted.

On December 4, 1959, the District Court for the Southern District of Alabama entered an order purporting to be a final order of dismissal, reciting in its order that "The Court having granted on the 4th day of August, 1959, the motion of the defendant Arrow Transportation Company for summary judgment, holding in effect that the defendant as a matter of law was entitled to judgment dismissing the complaint against it; and it appearing from the third party complaint of Arrow Transportation Company, filed herein against Zurich Insurance Company, that the said insurance company was pleaded on the sole ground that in the event Arrow is held to have incurred any liability to the plaintiff Herman Howze * * * (it) is entitled to indemnity from Zurich * * * *."

On the 28th day of December, 1959, Howze appealed to the United States Court of Appeals for the Fifth Circuit. Arrow and Zurich filed a motion to dismiss the appeal on the ground that the order granting Arrow's motion for summary judgment was a final judgment in that it disposed of the entire proceeding, and; therefore, Howze's appeal, coming more than 30 days after the date of this order, came too late.

The motion to dismiss filed by Arrow and Zurich was granted, *Herman Howze v. Arrow Transportation Company and Zurich Insurance Company*, 280 F. 2d 463 (5 Cir. 1960).

## ARGUMENT

### POINT I

**The petition for a writ of certiorari was not filed within the time prescribed by Section 2101(c) Title 28 U.S.C.A.**

Section 2101(c) of Title 28, U.S.C.A. provides:

"Any other appeal or any writ of certiorari intended to

bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within 90 days after the entry of such judgment or decree. A Justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

Copies of the petition for a writ of certiorari were received by counsel for appellee Zurich Insurance Company on October 27, 1960, in an envelope postmarked October 26, 1960. The judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed on petition for a writ of certiorari was entered on June 30, 1960, obviously more than 90 days prior to the filing of the petition for a writ of certiorari.

## POINT II

**Petitioner failed to notify appellee Zurich Insurance Company of the granting of an extension of time within which to file a petition for a writ of certiorari, if such extension of time was in fact granted.**

Paragraph 4 of Rule 34 of the Rules of the Supreme Court, 28 U.S.C.A., requires that whenever a Justice has granted an extension of time within which a party may petition for a writ of certiorari it shall be the duty of the party to whom such extension is granted to give all other parties to the proceeding prompt notice thereof. Neither appellee Zurich Insurance Company nor its counsel of record has received any notice from petitioner or his counsel of record to the effect that any extension of time was granted the petitioner, giving to such petitioner additional time within which to file a petition for a writ of certiorari.

## POINT III

**The petition for a writ of certiorari filed by petitioner fails to comply with the provisions of Rule 23 of the Rules of the Supreme Court, 28 U.S.C.A.**

Paragraph 1(b) (ii) of Rule 23 of the Rules of the Supreme Court, 28 U.S.C.A., provides that the petition for a writ of certiorari shall contain the date and terms of any order granting an extension of time within which to file a petition for a writ of certiorari. If in fact such an extension of time was granted to petitioner the petition for a writ of certiorari does not contain the data respecting the order granting this extension required by the pertinent provisions of Rule 23 hereinabove referred to.

## POINT IV

**The affirmative grounds set out in Points I through V, taken in conjunction with the argument in support thereof, do not present the requisite special and important reasons required by the Supreme Court of the United States for granting of the writ.**

Petitioner's Point I is to the effect that there is a conflict of decision between the Circuits of the United States Courts of Appeal.

The decision of the United States Court of Appeals for the Fifth Circuit, review of which is sought by petition for a writ of certiorari here, does not conflict with any decision of any of the other United States Circuit Courts of Appeal, or decisions of this Court.

Petitioner, in his petition at page 4, states affirmatively that there is a conflict of decisions between the Circuits of the United States Courts of Appeal, and as authority

cites the decision of the United States Court of Appeals for the Second Circuit in the case of *Luckenbach Steamship Company, Inc.*, v. *H. Muehlstein & Company, Inc.*, 280 F. 2d 755 (2 Cir 1960), as being contrary to or in conflict with the decision of the United States Court of Appeals for the Fifth Circuit in the instant case.

In *Luckenbach Steamship Company, Inc.* v. *M. Muehlstein & Company, Inc., supra*, the Court of Appeals for the Second Circuit dismissed an appeal from an order dismissing a third party complaint filed by Luckenbach Steamship Company against H. Muehlstein & Company seeking indemnity in the event of adverse judgments, holding explicitly that because there had been no certification by the District Court under the provisions of Rule 54 (b), Fed. Rules of Civil Procedure, 28 U.S.C.A., "in no event can the action be appealable at this time and upon this subordinate issue of indemnity over." Just wherein this decision is in conflict with the decision of the United States Court of Appeals for the Fifth Circuit in the instant case, is not known to appellee Zurich nor does petitioner in his brief enlighten us in this respect in any way.

In the instant case, the question before the Court of Appeals for the Fifth Circuit was the applicability of Rule 54 (b) when there is only one cause of action. There was a motion for summary judgment granted as to the original complaint, not the third party complaint and not on a subordinate issue of indemnity over. The Fifth Circuit held that Rule 54(b) did not apply. The *Luckenbach Steamship Company* case and the instant case do not conflict in any way. They involve completely different questions of law and are similar only in that they both involve third party actions for indemnity over in the event of adverse judgment. In the *Luckenbach Steamship Com-*

*pany* case the third party complaint was dismissed, in the instant case the original complaint was in effect dismissed as a matter of law. In holding that Rule 54(b) had no applicability, the Fifth Circuit holds in granting the motion to dismiss the appeal:

> "Arrow's claim for indemnity against Zurich is dependent entirely on the possibilty of Arrow's being held liable to Howze. It is so completely incidental to and dependent upon the principal claim that there can be no recovery upon the third party claim unless the plaintiff prevails on the principal claim; . . . Similarly, Zurich's right to reimbursement for compensation benefits would not arise until there would be a judgment in favor of Howze.
>
> "In granting summary judgment in favor of Arrow and in dismissing Howze's complain, the trial judge decided the only question before him for decision."

Petitioner's Point II is to the effect that the decision by the Fifth Circuit in the instant case has made certification under the Federal Rules of Civil Procedure, Rule 54(b) completely ineffectual.

Petitioner has taken a sentence from Judge Brown's dissenting opinion in the instant case completely out of context and sets it forth as a ground for stating that the decision by the Fifth Circuit has made certification under Rule 54(b) completely ineffectual, and apparently, for all purposes, renders Rule 54(b) meaningless. That this is incorrect is readily seen upon examination of the opinion of the Fifth Circuit in the instant case and also Judge Brown's dissenting opinion. The majority opinion simply holds that in a case involving but a single cause of action, when a judgment has been rendered it has the effect of deciding the only question before the court involving that single cause of action. There is no necessity for the certi-

fication required by the provisions of Rule 54(b) for the simple reason that Rule 54(b) does not apply.

In the dissenting opinion, Judge Brown directs his statement, which is quoted by the petitioner, to a case decided by the Fifth Circuit, *Meadows* v. *Greyhound Corp.*, 235 F. 2d 233 (5 Cir 1956), in which it holds that a single cause of action involving multiple parties is not a multiple claim, *ergo*, a certification under 54(b) is ineffectual because inapplicable. Judge Brown then goes on to state that the instant case is, in his opinion, something in between (a single cause of action case with multiple parties and a multiple claims action).

Point III set out on page 7 of the petition is to the effect that the decision of the Fifth Circuit in the instant case constitutes a radical departure from established law. Argument in support of this point consists solely of a repetition of the statement set forth in heavy type under Point III, a statement to the effect that the appeal was timely taken and a quote from the opinion of the Second Circuit in *Luckenbach Steamship Company* v. *H. Muehlstein & Company, Inc.*, *supra*. Petitioner does not set forth what the established law is nor does he deign to point out wherein the Fifth Circuit departed therefrom in the instant case. If the *Luckenbach Steamship Company* case meets petitioner's concept of established law applicable here, and he leaves no alternative but that, petitioner's statement here is wholly without merit for as we have demonstrated hereinbefore, the decision in the instant case and the decision in the *Luckenbach Steamship Company* case are readily reconcilable and, therefore following petitioner's own logic, the decision in the instant case is in no way a departure from established law.

Point IV is to the effect that an order subject to revision is not appealable. For argument in support of this

proposition, petitioner makes several statements, none of which is supported by the citation of any applicable authority.

Petitioner refers to the fact that it is stated in the opinion in the instant case that "Howze did not amend his complaint to assert a cause of action against Zurich", and goes on to state that apparently the court below attributed some importance to this fact, otherwise, no comment thereon would have been made. The foregoing is followed by a statement to the effect that the petitioner's time to assert a direct claim or cause of action or to amend his complaint was still available up to December 4, 1959, and cites as authority therefor, *Meglio* v. *United States Lines*, 143 F. Supp. 91 (D.C. E.D.N.Y., 1956). Again the petitioner has taken a sentence from the opinion of the court below and attempts to attach to it great significance. The quoted sentence, "Howze did not amend his complaint to assert a cause of action against Zurich" is set out in that portion of the opinion of the court below relating to the fact that Arrow's claim against Zurich and Zurich's right of reimbursement from Howze are both dependent upon the success of Howze's action against Arrow and logically a judgment in favor of Arrow would dispose of Arrow's claim against Zurich and Zurich's claim against Howze.

In addition to the foregoing, *Meglio* v. *United States Lines*, *supra*, can hardly be considered as supporting the contention of petitioner that an order subject to revision is not appealable. In this case the District Court for the Southern District of New York was called upon to consider the alleged failure of a libelant in an admiralty action to comply with the relevant portions of Rule 56 of the Admiralty Rules, 28 U.S.C.A. The instant action is not in admiralty but is a civil action and one to which the Admiralty Rules do not apply.

Petitioner concludes his argument under Point IV with the statement that Zurich's claim against Howze was still in full force and effect until December 4, 1959. While petitioner does dot exactly so state, we assume that he also takes the position that Arrow's claim against Zurich was still in full force and effect until December 4, 1959. Neither of these two contentions is correct inasmuch as both the claim of Arrow against Zurich and Zurich against Howze were conditioned and wholly dependent upon there first being a recovery by Howze against Arrow. If Howze was not entitled to recover from Arrow, as the District Court so held on August 5, 1959, in granting Arrow's motion for summary judgment, then Arrow was not entitled to recover from Zurich and Zurich was not entitled to recover from Howze. There were no claims left pending after the order granting the motion for summary judgment on August 5, 1959; the District Court had decided all of the questions before it for decision and had disposed of all the questions presented in the action.

Point V consists of a statement to the effect that doubt as to judicial intent under circumstances where compliance with Rule 54(b) F.R.C.P. would eliminate uncertainty constitutes an invitation and requirement for innumerable protective appeals, otherwise unnecessary and improper. As argument in support of this broad generality, petitioner points out that the District Court entered an order of final dismissal on December 4, 1959, and goes on to state that no attorney would be justified in assuming that an order dismissing an action against one of these defendants constituted a dismissal against all of them.

In answer to the contention that no attorney would be justified in assuming that an order dismissing an action against one of several defendants constituted a dismissal against all others, we simply state that there was no order

here dismissing an action against one of several defendants. There was one plaintiff and one defendant against whom the plaintiff stated one cause of action and in granting the motion for summary judgment the court decided against the plaintiff, petitioner here, on his asserted cause of action. As the court below holds in the majority opinion, there was only one defendant in the case and only one cause of action. Therefore, an order of dismissal as to this defendant would of necessity constitute a dismissal of the entire action and the side or subsidiary issues raised therein.

Petitioner simply failed to appeal at the proper time and is now seeking to make up for his error.

Petitioner then goes on to state that the Second Circuit would have dismissed an appeal from the order granting the motion for summary judgment and disposing of all the questions involved, and again cites no authority for this conclusion whatsoever. The Second Circuit obviously was not called upon to decide this question, nor has it or any other Circuit rendered a similar decision on similar facts. However, as we demonstrate hereinafter, the decision in the instant case is more than amply supported by decisions of this Court as well as those of the Circuit Courts of Appeal. Perhaps petitioner is seeking to bolster his contention that there is a conflict between the decision of the Fifth Circuit in the instant case and the decision of the other Circuits, particularly the Second Circuit, by taking as his premise an assumption that the Second Circuit would have dismissed an appeal from the order granting the motion for summary judgment and therefore the decision of the court below is in conflict with what the Second Circuit might do if presented with the question. Petitioner would certainly create "doubt as to judicial intent" if this sort of argument were to prevail.

Petitioner here would have this court decide a question of law on which there is conflict not between Circuit Courts of Appeal but within one Circuit, the Fifth Circuit. The only authority cited by petitioner which might be deemed applicable is Judge Brown's dissenting opinion, and even Judge Brown recognizes that the instant case is unique in that in his opinion it comes somewhere in between one involving multiple claims under Rule 54(b) and one involving a single cause of action with multiple parties.

## POINT V

**The petition for a writ of certiorari fails to affirmatively establish the requisite special and important reasons for the granting of same.**

Parargaph 1 of Rule 19 of Supreme Court Rules, 28 U.S.C.A., provides that a review on writ of certiorari is not a matter of right but of sound judicial discretion, and will be granted only where there are "special and important reasons therefor." The category of "special and important reasons" has been held to be those which "imply a reach to a problem beyond the academic or episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 99 L. ed 897, 75 S. Ct. 614 (1955).

Petitioner asserts nothing in the petition for a writ of certiorari which comes within the category of special and important reasons for the granting of same. Indeed, as we have demonstrated hereinbefore under our Point IV, the petition for a writ of certiorari and the grounds asserted therein in support of the petition when distilled down to what could be considered as the essence of the petition, say simply that the petitioner thinks that the Court of Appeals for the Fifth Circuit has rendered a decision which conflicts with those of other Circuit Courts

of Appeals, but is unable to point out any decision of any other court which conflicts, and, furthermore, that the Fifth Circuit has ruled against us, and, therefore, it is wrong, without being able to offer any authority in support of such contention.

This court states that the category of special and important reasons impliedly means those which reach to a problem beyond the academic or episodic, *Rice v. Sioux City Memorial Park Cemetery, Inc., supra*, and none of the reasons given by the petitioner in the petition for a writ of certiorari attain even a reach to a problem which could be considered more than academic or episodic, much less reaching beyond.

For reasons unbeknownst to us, petitioner failed to appeal from the order granting the motion for summary judgment, and now having erred, seeks to rectify his mistakes by asserting that this matter presents a problem of such significance as to require review thereof by this court. We must insist that not only is such not the case here, but that in all respects the decision of the Court of Appeals for the Fifth Circuit in the instant case is correct, as we shall demonstrate hereinafter.

## POINT VI

**The decision of the Court of Appeals for the Fifth Circuit is correct, and there is no necessity for review thereof by the Supreme Court.**

In the instant case, the Fifth Circuit holds that in a case involving a single cause of action between one plaintiff and one defendant there is no field of operation for the provisions of Rule 54(b) of the Federal Rules of Civil Procedure, Title 28 U.S.C.A., inasmuch as by its terms Rule 54(b) applies to actions involving multiple claims,

The term "claim", as used in Rule 54(b) providing for entry of final judgment on one or more, but less than all of the claims on the express determination that there is no just reason for delay, is defined as meaning "a cause of action," *School District 5* v. *Lindgren*, 259 F. 2d 101 (9 Cir. 1958), and *Smith v. Benedict*, 279 F. 2d 211 (7 Cir 1960).

Howze filed a claim against Arrow, asserting a cause of action based upon allegations of negligence and unseaworthiness. Arrow filed a third party complain against Zurich Insurance Company, the insurer of the employer of Howze and under whose supervision and control the vessel on which Howze was injured was being unloaded, asserting a claim against Zurich in the event that Arrow was held to be liable to Howze. Zurich filed a claim against Howze seeking reimbursement for workmen's compensation benefits paid to or for Howze in the event Howze should recover from Arrow.

The complaint of Howze against Arrow asserted a cause of action, and when the court granted Arrow's motion for summary judgment, Howze was held as a matter not to be entitled to recover from Arrow. Inasmuch as Howze had been held as a matter of law not to be able to recover from Arrow, it followed, as it must, that Arrow had no cause of action against Zurich and Zurich had no cause of action against Howze. Arrow could not recover from Zurich until Howze had a judgment against Arrow and Zurich could not recover from Howze until Howze had a judgment against Arrow. Therefore, when Howze was held not to be able to recover from Arrow, Arrow had no cause of action against Zurich and Zurich had no cause of action against Howze. Both were so completely incidental to and dependent upon the principal claim that there could be no recovery thereon unless the plaintiff

prevailed on the principal claim, *Panichella* v. *Pennsylvania Railroad Company*, 252 F. 2d 452 (3 Cir 1958).

Admittedly, the District Court did not spell out that by entering an order granting the motion of Arrow for summary judgment that the court was also disposing of the then moot third party complaint of Arrow against Zurich and Zurich's claim against Howze. However, "no present statute or rule (requires a judgment to be contained in a separate document or so labeled), and the decisional law seems settled that 'no form of words . . . is necessary to evidence (the) rendition of a judgment'." *U.S.* v. *Schaefer Brewing Company*, (356 US 227, 2 L ed 2d 721, 78 S Ct 674 (1958). See also *Erstling* v. *Southern Bell Telephone and Telegraph Company*, 255 F. 2d 93 (5 Cir 1958), wherein the Fifth Circuit stated:

> "No form of words is necessary to evidence the rendition of a judgment. If the language used by the court clearly evidences the judge's intention that it shall be his final act, it constitutes a final judgment . . . The later filing and entry of a more formal judgment could not constitute a second final judgment in the case nor extend the time to appeal."

In *United States* v. *Wissahickon Tool Works*, 200 F. 2d 936 (2 Cir 1952), an order of the District Court stating simply that "Plaintiff's motions for summary judgment are granted with interest and costs" was held to be a final judgment.

The rights of Arrow against Zurich and Zurich against Howze became moot and academic on the granting of the motion for summary judgment. Following this action by the District Court there was only one cause of action involved and only one plaintiff and one defendant, and because there was only one cause of action or one claim,

Rule 54(b), by its terms, was expressly inapplicable to such a situation and there was no necessity for the making of a certificate required by Rule 54(b), in order to render such a judgment final. Rule 54(b), as amended "does not apply to a single claim action." *Sears, Roebuck & Company* v. *Mackey*, 351 US 427, 100 L ed 1297, 76 S Ct 892 (1956). It is applicable by its terms only to separate and distinct claims. *Schwartz* v. *Eaton*, 264 F 2d 195 (2 Cir 1959).

The claim for relief referred to in Rule 54(b) must show that the claimant is "entitled to relief", i.e. the claim for relief must indicate the existence of a cause of action. "Cause of action" in this context means "a claim that facts exist which, under our legal system, are recognized as entitling the claimant to judicial action in vindication of right or in remedying a wrong." *Gold Seal Company* v. *Weeks*, 209 F. 2d 802 (D.C. Cir 1954).

The third party complaint of Arrow against Zurich wholly failed to state a cause of action after the granting of Arrow's motion for summary judgment. Also, Zurich's claim for reimbursement was of no force and effect, as Howze had been held not to be entitled to recover from Arrow. Arrow and Zurich no longer had any cause of action, therefore, they no longer had any claims for relief.

There was no occasion in the instant case following the granting of the motion for summary judgment for any further action on the part of the District Court, for in granting such motion "the trial judge decided the only question before him for decision . . . No occasion for the judge's further action to render it final under Rule 54(b) was presented, since that applies only to an order which adjudicates less than all claims." *General Time Corp.* v. *Padua Alarm Systems*, 196 F. 2d 351 (2 Cir 1952).

Furthermore, in *Town of Oakdale, Virginia* v. *United States*, 198 Fed. 2d 438 (4 Cir 1952), it was held:

> "The condition precedent for the application of this rule, 54(b), is the presence of more than one claim in the action, and where there is only a single claim or 'factual occurrence', the rule cannot be invoked to confer jurisdiction upon an appellate court."

However, if the contention apparently being made by petitioner that multiple claims were involved in the action before the District Court is accepted by this court, the decision of the Fifth Circuit is still correct and reaches the correct result.

Rule 54(b) provides that "When more than one claim for relief is presented in an action . . . the Court may direct the entry of a final judgment upon one or more but less than all of the claims", only on the express determination and certification in the format required by the Rule. Thus, if all of the so-called multiple claims involved in the instant case, assuming for the sake of argument that the third party complaint and the claim of Zurich against Howze assert claims within the meaning of Rule 54(b), it is readily apparent from an examination of the quoted portion of the Rule itself that if all of the claims were disposed of, then there would be no field of operation for the Rule and it would have no applicability. Rule 54(b), as amended, does not apply "to a multiple claims action in which all of the claims have been finally decided." *Sears, Roebuck & Company* v. *Mackey, supra*.

In the instant case, the District Court in granting the motion of Arrow for summary judgment, disposed of not only the "claim" of Howze against Arrow, but also the "claims" of Arrow against Zurich and Zurich against Howze. Having so disposed of all the "multiple claims"

there was no necessity for any certification in accordance with Rule 54(b) in order to make the order granting the motion for summary judgment final and appealable.

Consider the effect of the granting of the motion for summary judgment. Nothing remained to be done except for the petitioner to appeal if he so desired; there was no claim left undecided; and nothing was left pending for further action by the District Court. The District Court did not decide "one or more but less than all of the claims," but decided them all and left nothing pending or remaining to be decided. See Moore's Federal Practice, Vol. 6, Pages 220-221, wherein it is stated:

> The amended Rule (Rule 54(b)) does not . . . require a certificate by the District Court when the court has fully adjudicated all of the multiple claims; that adjudication in itself constitutes a final judgment. And the Rule does not authorize the District Court by certificate to make a final partial adjudication of a single claim or several claims. Since in the foregoing situations the Rule is inapplicable and there is, therefore, no warrant for the District Court to make a certificate, a certificate by it will neither add nor detract from the character of the orders; and their appealability, either as an interlocutory or final order, is governed by principles other than those of the amended Rule."

## CONCLUSION

Whether considered from the position taken by the Fifth Circuit in the instant case that Rule 54(b) has no application or from petitioner's apparent assertion that Rule 54(b) applies, the decision is correct, and we

spectfully insist that the petition for writ of certiorari should not be granted.

Respectfully submitted,

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